SUPREME COURT U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1974

NO. 74-1205

EDWARD CHALE and
LEE J. CHRISTAKIS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1974

NO._____

EDWARD CHALE and LEE J. CHRISTAKIS, Petitioners, v. UNITED STATES OF AMERICA, Respondent.	)))))))))

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 23, 1975. A timely petition for re-hearing was filed and denied on February 19, 1975.

OPINION BELOW

The opinion of the Court of Appeals, which is denominated an order and is not to be published, appears as

Appendix A. The order denying the petition for re-hearing appears as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 23, 1975. A timely petition for re-hearing was filed and denied by order of Court on February 19, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In December, 1973, the petitioners were charged by way of indictment with violation of 18 U.S.C. 111 -- assaulting a Federal Agent. Chale was a police officer in the City of Gary and Christakis was a practicing attorney in the City of Gary. Both of the petitioners contended that they had no knowledge of the identity of the victim as a Federal Officer. The trial court gave, over objection, an instruction that informed the jury that the Government need not prove as part of its case that the defendants had actual knowledge that the victim was an FBI Agent who was engaged in the performance

of his official duties. The petitioners submitted an instruction which would have allowed the jury to consider the evidence of the petitioners tending to show that they were ignorant of the official capacity of the victim to negate the element of willfulness. The instruction was refused. The first question thus presented is:

> 1) Is absence of scienter of the agent's official status and identity a defense which must be submitted to the jury under a charge of violation of 18 U.S.C. 111?

During the course of the trial, the petitioners sought to impeach the testimony of a Government informant and principal witness by showing, through extrinsic evidence, that the witness was addicted to the use of marijuana and opium on the ground that such evidence was relevant as affecting the credibility of the witness. The trial court refused to permit extrinsic evidence on this issue. The question thus presented is:

> 2) May an informant-witness be impeached by extrinsic evidence tending to show the informer-witness' use and/or addiction to drugs?

STATUTES INVOLVED

18 U.S.C. 111 provides as follows:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in Sec. 1114 of this Title, while engaged in or on account of the performance of his official duties, shall be fined not more than Five thousand ($5,000.00) Dollars or imprisoned not more than three (3) years or both. . ."

STATEMENT OF FACTS

Petitioners were charged with and convicted of violation of 18 U.S.C. 111 -- assaulting a Federal Officer. Trial by jury was had and, on March 21, 1974, the jury returned verdicts of guilty as to each of the petitioners. On May 10, 1974, the trial court entered final judgment of conviction, sentencing each of the petitioners to six (6) months, thirty (30) days to be served, and imposing a fine of Three thousand ($3,000.00) Dollars, the service of sentence to be followed by a three (3) year term of probation. On the evening of August 1, 1973, the petitioners were part of a group of about sixteen (16) other people attending a party at the Golden Coin Restaurant and Tavern in Gary, Indiana. Christakis was a lawyer in the City of Gary and was giving a party for his secretary

who was about to be married. The petitioner Chale was a guest at the party and was a detective employed by the Gary Police Department.

The party was being held in the lounge area of the restaurant which was dimly lit and heavily populated. The establishment is known as a "swinging singles" bar. During most of the events that transpired, a rock band was playing.

About 11:00 P.M. on the evening of August 1, 1973, Rick Seebauer, a Porter County Deputy Sheriff, who had, prior to the time he became a deputy sheriff, been working as an informant with FBI Agent Melchiori in connection with gambling operations in Gary until June 2, 1973, came into the Golden Coin. The activities he had conducted with Melchiori culminated in some gambling raids on June 2, 1973, and, as a result of those raids, his informant status became generally known.

At the time he entered, he was following a narcotics suspect. As he walked through the entrance to the bar, he saw the petitioner Chale and the petitioner Christakis and some other individuals. When he entered the lounge, an

unidentified individual spoke to him and said something to the effect that he wouldn't live to testify before the grand jury.

He then entered the bar, stayed for a brief time, left and contacted Agent Melchiori and informed him of the threat. He and Melchiori returned to the tavern a short time later. Melchiori accosted the unidentified individual and asked him to identify himself. The party refused and walked back into the bar. Melchiori attempted to follow. The petitioner Chale blocked his movements. There followed an altercation during the course of which the agent claimed that both petitioners struck him. Each of the petitioners denied having struck the agent, but Chale admitted that he did impede his progress but only in an attempt to ascertain his identity; that, after he had ascertained his identity, he stepped aside and allowed the agent to pass. This was admitted by the agent, but the agent stated that the assault took place before Chale stepped aside.

After Chale stepped aside, the agent was struck by a third person, a Gary detective by the name of Wally DeRose,

and was rendered unconscious. DeRose was not charged.

After Seebauer had testified on direct examination, he was cross-examined with respect to his use of drugs, marijuana and opium. He denied ever having used any of these substances. He stated that he simulated smoking pot only while engaged in his undercover activities; he would never touch marijuana.

The petitioners called several witnesses to impeach Seebauer on this statement. Objection was made by the Government and the Court sustained the objection. The petitioners offered to prove that the witness had, on several occasions, the last of which was as recent as July of 1973, (the incident having occurred on August 1, 1973) smoked marijuana and distributed marijuana to other persons, including young girls, and that, on one occasion in 1973, he smoked opium; that the witness was a continuous user of narcotics beginning in October of 1972, and continuing to sometime in May or June of 1973. The evidence was offered as bearing upon the credibility of the witness.

REASONS FOR GRANTING THE WRIT

I.

LACK OF SCIENTER OF THE AGENT'S STATUS IS A DEFENSE

The undisputed testimony reveals that, at the time the alleged offense occurred, Agent Melchiori was dressed in casual clothes and had entered a crowded swinging singles bar at 1:30 in e morning, the lighting was dim and there was a rock band playing. There is no evidence that the petitioner Christakis ever became aware of Melchiori's status until after the affray had been completed. The evidence is conclusive that after Chale became aware of the agent's official status he did nothing to obstruct, impede or interfere with the agent and certainly did not assault the agent.

The petitioners tendered two instructions covering their respective theories of defense. Chale's instruction No. 5 read as follows:

> "If you find beyond a reasonable doubt that the defendant Chale did in fact forcibly assault, impede or interfere with Agent Melchiori but at the time that he did so he had no knowledge that Melchiori was an F.B.I. Agent, I instruct you that you must find the defendant Chale not guilty."

Christakis submitted the following instruction:

> "I instruct you that lack of knowledge on the part of a defendant that the person with whose duties he interfered was a federal officer, is not an absolute defense to interfering with a federal officer while in the performance of his duties; there can, however, be a combination of circumstances which may provide the accused with a defense through justification for use of force and one such circumstance is lack of scienter. Lack of scienter means that the defendant did not know that Melchiori was a federal officer."

Chale submitted an alternative instruction which was also refused which read as follows:

> "While knowledge of the agent's official status is not an essential element of the crime charged, if you find that the defendant Chale did not know the official status of Agent Melchiori until after the agent had displayed his identification to him and if you further find that after Agent Melchiori displayed his identification to the defendant Chale and Chale examined the same and thereafter did nothing to impede or obstruct the agent, I instruct you that you must find the defendant Chale not guilty."

With respect to this issue, the Court gave an instruction to the jury which merely informed them that it was not necessary that the Government prove as part of its case that the defendants had actual knowledge that the victim was an F.B.I. Agent who was engaged in the performance of his official duties.

There is a split of authority in the Circuits as to the necessity of proof of scienter. There appear to be three distinct views: (1) Proof of scienter is not necessary, U.S. v. Ganter (7th Cir. 1970) 436 F.2d 364; (2) Proof of scienter is a necessary element which must be proven by the Government, U.S. v. Young (5th Cir. 1972) 464 F.2d 160; (3) Lack of scienter is one of a combination of circumstances which together may justify and make defensible assault or resistance to arrest, U.S. v. Ulan, (2d Cir. 1970) 421 F.2d 787.

In U.S. v. Young, (5th Cir. 1972) 464 F.2d 160, it was held that, if a defendant asserts lack of intention or willfulness based upon ignorance of the identity of the victim as a federal officer and ignorance of the victim's official privilege to interfere with the defendant's person or freedom of movement, the jury must be allowed to consider the defendant's evidence tending to show that he was ignorant of the official capacity of the victim.

In Young, the Court of Appeals for the Fifth Circuit observed that a rule that would hold a defendant absolutely liable for assaulting a Government officer when there is

substantial evidence that the defendant was acting upon a mistaken belief that the agent is a private citizen about to commit an intentional tort deprives the defendant of having his case submitted to the jury on the theory that the assault must be an intentional act willfully done without legal excuse.

The rule of the Seventh Circuit Court of Appeals in Ganter which holds that there are no circumstances where ignorance of the officer's identity is material permits conviction without any proof of unlawful intent. The better view and the view that is finding more acceptance in the various Circuits is that there may be special facts and circumstances where lack of scienter of the agent's official status is a factor the defendant is entitled to have the jury consider in determining whether or not he acted willfully. U.S. v. Perkins (1st Cir. 1973) 488 F.2d 652.

In U.S. v. Alsondo (2d Cir. 1973) 486 F.2d 1339, cert. granted 94 S.Ct 1932, where the charge was conspiracy to violate Sec. 111, it was held that specific knowledge of the official federal capacity of the assault victim must be proved. That case is now pending before this Court.

We can perceive no valid distinction for the requirement of scienter on a charge of conspiracy to commit the substantive offense and the lack of requirement of such proof where the charge is the substantive offense itself.

II.

MAY AN INFORMANT-WITNESS BE IMPEACHED BY EXTRINSIC EVIDENCE OF DRUG ADDICTION

During the course of the trial, the Government called as a witness one Rick Seebauer. There were only two witnesses whose testimony supported the Government's theory of the case -- Melchiori, the F.B.I. Agent, and Seebauer, an informant-witness. Eighteen (18) other witnesses testified, some called by the Government, some called by the defendants, and not one of them testified that either of the defendants struck or assaulted the agent Melchiori.

On cross-examination, Seebauer was asked questions concerning his use of marijuana and drugs and narcotics. He denied that he ever was addicted to them or used them in any way.

As part of their case in chief, the defendants called several witnesses to impeach Seebauer on this point. The

testimony of all of those witnesses was excluded. The offer to prove included proffered testimony that Seebauer, on at least three (3) separate occasions, the last of which occurred in July, the offense having occurred on August 1, distributed and smoked marijuana not in any connection with his undercover status as a Government informant. Another witness would have testified that, as recently as June of 1973, Seebauer had smoked opium and marijuana in her presence.

In dealing with this issue, the order of the Court of Appeals merely states:

> ". . . The exclusion of the extrinsic evidence contained in the testimony of the four witnesses was proper. Specific acts of misconduct other than conviction of a crime to attack the credibility of a witness may not be proven by extrinsic evidence. . . " (App. A) Order p. 4.

No claim was made by the defendants that Seebauer was incompetent to testify by virtue of his use of drugs and narcotics. Admission of the testimony was sought on the ground that such evidence was relevant as to the credibility of the witness.

In U.S. v. Kinnard (D.C. Cir. 1972) 465 F.2d566, the Court of Appeals held it to be reversible error for the trial judge to

exclude extrinsic evidence tending to show the informer-witness' use and/or addiction to drugs, stating:

> " . . . We hold only that if evidence is presented by the defense that a paid Government informer is also an addict and under indictment for narcotics violations, this evidence must be presented to the jury along with the special cautionary instruction outlined above . . ."
> (at p. 575)

In U.S. v. Fowler (D.C. Cir. 1972) 465 F.2d 664, it was held that the trial judge committed reversible error in limiting cross-examination of a Government witness as to his use of narcotics.

In Fowler, the Government's principal witness had formerly been employed as an undercover agent and had been dismissed from such employment and was no longer connected with the police department. Defense counsel knew from conversation with the former agent that shortly before his dismissal he had been given two urine tests by the police department to determine whether he was using narcotics. The witness had been requested to take a third urine test; he refused to do so and shortly thereafter his services with the police department were terminated. The reason stated

on the record of his dismissal was that he was allegedly underweight.

The trial judge informed defendant's trial counsel, unless he could substantiate his claim with respect to the witness' claimed use of drugs, he could not enter that area on cross-examination. In holding that this restriction on cross-examination was prejudicial, the Court of Appeals remanded to the District Court for a hearing at which time the defendant would also be permitted to introduce evidence from the police department as to the reasons for the dismissal of the witness.

Although the defendants here were not restricted on their cross-examination of the witness Seebauer, the trial judge ruled that the defendants were bound by his answers and could not, through the use of extrinsic evidence, develop his use and/or addiction to drugs and marijuana. The adoption of such a rule gives a witness an unbridled license to lie. If the witness knows that he can, with impunity, deny that he has ever used drugs or narcotics, the right to cross-examine him concerning such use or addiction is hollow and meaningless.

The holding of the Court of Appeals for the Seventh Circuit in this case is in conflict with the holding of the Court of Appeals for the District of Columbia on this issue.

Other Circuits have held that the witness' use of narcotics does affect the credibility of the witness and the weight of his testimony. U.S. v. Hicks (3rd Cir. 1968) 389 F.2d 49; Gurleski v. U.S. (5th Cir. 1968) 405 F.2d 253; U.S. v. Parker (9th Cir. 1970) 428 F.2d 488.

In all of the above cases, the question before the various courts of appeals was the competency of the witness to testify. In each of those instances, the Courts held that addiction or use of drugs did not disqualify the party as a witness but did state that such use or addiction could be shown on the issue of the credibility of the witness.

CONCLUSION

This petition raises two substantial issues on which there is a clear conflict in the Circuits with respect to at lease one of the issues -- proof of scienter. This Honorable Court has already granted certiorari in a related case.

As to the second issue, there is an apparent conflict in the Circuits. The credibility of informant-witnesses who are drug users and/or addicts is one which is constantly recurring in the Federal Courts and is likely to continue to be a future source of litigation.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued January 9, 1975)

January 23, 1975.

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

Hon. J. SAM PERRY, Senior District Judge*

NOS. 74-1417 and 74-1418

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD CHALE and LEE J. CHRISTAKIS,

Defendants-Appellants.

Appeal from the United States District Court for
The Northern District of Indiana, Hammond Division.

No. 73 HCR 158 -- Allen Sharp, Judge.

ORDER

These appeals are from two convictions for assaulting a federal officer in violation of 18 U.S.C. Sec. 111.

* Senior District Judge J. Sam Perry of the Northern District of Illinois is sitting by designation.

Defendants, Christakis, a practicing attorney, and Chale, a Gary Police Department detective, were convicted in a four-day jury trial of assaulting F.B.I. Agent Melchiori in a Gary night club on August 2, 1973. They appeal, complaining of the District Court's refusal to enter a judgment of acquittal or to grant them a new trial or a mistrial, and also arguing that other errors committed by the trial court require a reversal of their convictions. For the reasons set out below, we reject all defendants' arguments and affirm their convictions.

Viewing the evidence in the light most favorable to the government, as we must when we review a jury verdict, we find the record shows the following occurred: On the evening of August 1, 1973, defendants were attending a party at the Golden Coin night club in Gary, Indiana. About 11:00 P.M., Seebauer, who had worked with the F.B.I. as an informant on gambling investigations, came into the Golden Coin. He was accosted by an individual, who he later learned was Chale's brother. The brother told Seebauer that he wouldn't live to testify before the grand jury. After staying at the bar a few minutes, Seebauer left with another individual, called F.B.I. agent Melchiori from a public telephone, and explained to the agent what had happened. Seebauer drove to the agent's home, drove back to the Golden Coin with the agent, and reentered the Golden Coin at about 1:00 A.M. on August 2, 1973. Seebauer pointed out the individual who had threatened him. Agent Melchiori approached the individual, identified himself as an agent, and requested the individual to step into the dining area. As the two individuals were proceeding through a corridor, Chale stopped between them. Agent Melchiori identified himself to Chale and explained that he had to identify the other individual. Chale told the agent to go ahead but at the same time blocked his progress. Then a group of individuals including Chale and Christakis confronted the agent and impeded his movement. The agent was struck by Chale and Christakis, and eventually punched unconscious by another individual. The entire incident, from the time the

agent entered the Golden Coin until he was knocked out, took only about five minutes.

Motions for Judgment of Acquittal and for a New Trial

In arguing that either their motion for judgment of acquittal or their motion for a new trial should have been granted, defendants urge that the government failed to adduce sufficient evidence to support defendants' convictions. They argue that due to many conflicts in the evidence no reasonable man could conclude that they were guilty beyond a reasonable doubt and, alternatively, that the government failed to prove that the agent was acting in the performance of his official duties as an F.B.I. agent. Both these arguments must fail.

First, although defendants correctly point out that the evidence is contradictory in many respects, it is the jury's function to resolve questions of fact and we should not overturn its determinations where, as is true in the present case, there is substantial evidence to support the verdict. See Glasser v. United States, 315 U.S. 60, 80 (1942). Defendants ask us to hold that the testimony of agent Melchiori, which was in part corroborated by Seebauer's testimony, was so extensively contradicted by the testimony of defendants' witnesses that it was incredible and should not have been believed by the jury. But the question of the credibility of all the witnesses was for the jury to determine, and we cannot say that the testimony of a large number of defense witnesses, which itself contained many contradictions, is inherently more believable than the testimony of the government's principal witness, agent Melchiori. The government adduced sufficient proof to show that defendants wilfully assaulted a federal officer.

Second, defendants' argument that the government failed to prove that agent Melchiori was engaged in the performance of his official duties is meritless. The evidence, taken in the light most favorable to the government, indicates that the agent went to the Golden Coin to investigate a threat against a government witness, with whom the agent had worked for nine months. Based on this evidence the jury could

have reasonably concluded that the agent was "acting within the scope of what the agent is employed to do" rather than being engaged "in a personal frolic of his own." See United States v. Heliczer, 373 F.2d 241, 245, (2d Cir. 1967), cert denied, 388 U.S. 917 (1967). We will not disturb that determination.

Exclusion of Impeaching Testimony

During cross-examination of witnesses Seebauer and Melchiori, the defendants attempted to impeach their credibility by questioning them on extraneous matters. Seebauer was questioned about whether he used marijuana or, on one occasion, opium, whether he hired a man to steal a car, whether he had sexual relations with a 17-year-old girl, and whether he attempted in the presence of the girl to sell guns to blacks. Seebauer responded negatively to all these questions and the defendants offered to impeach Seebauer's answers by the testimony of three witnesses. The court overruled the offer of proof. Melchiori was questioned about whether he socially frequented the Golden Coin. He responded that he only went there on business matters. The court refused to permit defendants, on cross-examination of Melchiori, to ask him whether he was discovered one time at 4:00 A.M. in a woman's apartment by the woman's boyfriend. The court also excluded the testimony of the woman when the defendants offered her testimony to impeach Melchiori's credibility. Defendants contend that the court's rulings on these matters were erroneous. We disagree.

The exclusion of the extrinsic evidence contained in the testimony of the four witnesses was proper. Specific acts of misconduct, other than conviction of a crime, offered to attack the credibility of a witness, may not be proven by extrinsic evidence. United States v. Sager, 49 F.2d 725, 730 (2d Cir. 1931); 3A J. Wignore, Evidence Sec. 979 (Chadbourn rev. 1970); McCormick on Evidence Sec. 42, at 84 (2d ed. 1972). See also Rules of Evidence for United States Courts

and Magistrates, Rule 608(b), Pub. L. No. 93-595, 93d Cong., 2d Sess. (Jan. 2, 1975), 43 U.S.L.W. 137, 140 (Jan. 14, 1975). Furthermore, defendants receive no support from recent federal cases, mentioned in their brief, that permit extrinsic evidence as to drug addiction to be introduced, because they did not attempt to show that Seebauer was a drug addict. Marijuana is a non-narcotic drug and a single instance of smoking opium would not prove addiction. Limiting the scope of cross-examination of Melchiori to exclude questions concerning his presence in a woman's apartment at 4:00 A.M. on a date two months before the assault in issue here was not only within the trial court's discretion but a correct application of the rule stated in Rule 608(b)(2) of the Rules of Evidence for United States Courts and Magistrates, supra:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . . may, however, in the discretion of the court, if probative or truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness. . . .

Prior to their adoption by Congress, we encouraged the district courts to use the proposed rules as a guide. United States v. McCarthy, 445 F.2d 587, 590-591 (7th Cir. 1971). They will become effective July 1, 1975.

Cross-Examination of Chale's Character Witnesses

Chale objects to the District Court's ruling that permitted the government to cross-examine two witnesses, who testified concerning Chale's reputation for peace and quietude, about alleged gambling that Chale supposedly engaged in while he was a police officer.

As to the questioning of the second witnesses, the District Court's ruling was correct. The final question counsel for

Chale asked that witness was, "Q. You never heard anything bad about him?" This question and the witness' negative response opened up the entirety of Chale's character as a proper subject for complete cross-examination.

Counsel for Chale did not, however, put such a question to the first character witness. While we agree with the defendant that the form of the question was improper */ and that the trial judge should not have allowed the question to be asked, (see Michelson v. United States, 335 U.S. 469, 472, 483-484 (1948)), we conclude that his ruling was harmless error. Gambling in an unspecified context is not such a sinister activity that prejudice to the defendant was likely to result from the incident. Moreover, the question was merely cumulative to similar but proper questioning of Chale's other character witness. Finally, when the record of this four-day trial is viewed as a whole, this incident shrinks to insignificance in comparison with other attempts to impeach the testimony of witnesses by attacking their character. This minor error in the trial does not require a reversal.

Admission of Christakis' Written Statement

Defendants object to the admission into evidence of government exhibit 5, a written statement by Christakis made before two F.B.I. agents on August 3, 1973 at Gary, Indiana. The statement was admitted during rebuttal redirect testimony of F.B.I. agent Freas, one of the two agents before whom the statement was made. During the rebuttal direct, Freas testified about both oral and written statements of Christakis. On

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*/ The question is as follows:

> "If you had heard that Mr. Chale had gambled while he was a Policeman, would that make any difference in your opinion of Mr. Chale's character?"

cross-examination Freas was questioned extensively by counsel for Christakis concerning the accuracy of the written statement. On redirect, the government attempted to introduce the signed statement which the agent took from Christakis. The government explained that it offered the evidence solely to impeach the prior testimony at trial of Christakis which was inconsistent with the written statement. Defendant Chale objected to the admission of the statement on the grounds that it ran afoul of Bruton v. United States, 391 U.S. 123 (1968). Christakis objected to the admission of the statement because it only contained two or three contradictions, all of which were already before the jury and because it would be given undue weight by the jury and, therefore, prejudice him. The trial court admitted the statement, giving a cautionary instruction that the statement should only be considered by the jury on the issue of the credibility of Christakis. This instruction was given both when the statement was introduced into evidence and when the court charged the jury.

Chale's objection is easily disposed of. The reason for the Bruton rule is to prevent a statement of one defendant from being used against another defendant whom the statement incriminates. 391 U.S. at 127-128. In the present case, although the statement does mention Chale, it does not incriminate him. Therefore, no Bruton problem arises.

Christakis' objection is equally without merit. In the first place, it was an admission of a party and as such was admissible in evidence against him if it was relevant. Moreover, even apart from that obvious basis of admissibility, it was admissible for rehabilitative and impeaching purposes. During cross-examination of Freas, Christakis extensively attacked both the accuracy of the statement and the method in which it was recorded. On redirect, the government had the right to attempt to rehabilitate Freas' testimony by introducing the document itself. If impeachment were the only basis for admitting the document, Christakis would be correct in arguing that only part of the statement tended to impeach Christakis' testimony, but even in that event no prejudice

would have resulted from the admission of the parts of the statement that were consistent with his earlier testimony. The trial court could reasonably conclude that the jury would be better able to evaluate the prior inconsistencies if it had the entire written statement before it. Finally, in two cautionary instructions which gave Christakis more than he was entitled to, the court told the jury that the statement could only be used to impeach Christakis' credibility.

Jury Instructions

Defendants complain that the District Court erred in giving certain jury instructions and in refusing to give certain other instruction. Five instructions are complained of.

First, defendants complain of the court's charging the jury that for the government to establish the offense charged occurred it need not prove that defendants had "actual knowledge that the victim was an F.B.I. agent who was engaged in the performance of his official duties." Defendants urge that scienter of the official status of the assaulted agent is an essential element of the crime charged and that the court should have so instructed the jury. This circuit has followed the contrary view (United States v. Ganter, 436 F.2d 364, 365 (7th Cir. 1970)), and the trial court correctly instructed the jury on this point.

Second, defendants object to the trial court's charging the jury that "in weighing [a defendant's] testimony, the jury should consider the fact that the defendant has a vital interest in the outcome of this trial." They argue that the instruction prejudices the defendants in that it applied a different standard to evaluate their testimony. Although this court has "expressed reservations about" this self-interest instruction, it has held that giving it is not reversible error. United States v. Saletko, 452 F.2d 193, 197-198 (7th Cir. 1971), cert denied, 405 U.S. 1040 (1972).

Third, the defendants object to the court's refusal to give their tendered instruction defining "forcibly." Their argument that the failure to give this instruction permitted the jury to convict the defendants on a showing of something less than actual force is without merit. That actual force was a necessary element of the offense charged was apparent to the jury from another instruction of the court that informed the jury that one of the essential elements of the offense charged was that "[t]he act or acts of forcibly assaulting, impeding or interfering with an officer of the Federal Bureau of Investigation" occurred. There was no indication in the charge and the government never contended that anything less than actual force in assaulting, impeding, or interfering with the F.B.I. agent was sufficient to sustain a conviction. Since giving the tendered instruction would have served no significant purpose, the trial judge correctly refused to give it.

Fourth, the refusal of the court to give defendants' tendered informant instruction was not erroneous. Defendants argue that government witness Seebauer's status as an informant in a federal gambling investigation entitled them to have an informant instruction given to the jury. This contention is frivolous. It is clear from the record of the case that Seebauer was not an informant so far as the acts charged in this indictment were concerned. He was an eyewitness.

Finally, defendants attack as plain error the giving of an instruction on the F.B.I. agent's performance of official duties and the refusal to give their tendered instruction on the same point. Although they did not object at trial, the defendants now contend that a part of the given instruction was so "garbled" that it must have been meaningless to the jury. Even though the given instruction was not a model of clarity, any error it contained was not "so fundamental as not to submit the jury the essential ingredients of the . . . offense . . ." (Screws v. United States, 325 U.S. 91, 107 (1944)); therefore, giving the instruction was not plain error.

Since the trial court instructed the jury on the agent's performance of his official duty, there was no need to give the instruction tendered by the defendants on the same point.

Defendants' Motion for Mistrial

When the jury initially returned with its verdict, it brought both guilty and not guilty forms as to each defendant, all signed. The foreman explained that he had misunderstood the court's instructions, but that the jury's position was that both defendants were guilty. The court overruled defendants' motion for a mistrial, gave the jury four new verdict forms, and instructed them to return to the jury room and to deliberate until they reach a verdict. Shortly thereafter the jury returned with properly signed guilty-verdict forms, finding each defendant guilty, and two unsigned not guilty forms. Upon polling the jury, the court ascertained that each juror joined in the guilty verdicts.

The trial court properly denied the defendants' motion for a mistrial and utilized a proper procedure to correct the jury's harmless error. No prejudice resulted to the defendants, and the jury's actual verdicts were determined with certainty. See Slocum v. United States, 325 F.2d 465, 467-468 (8th Cir. 1963).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 19, 1975

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. PHILIP W. TONE, Circuit Judge

Hon. JOSEPH SAM PERRY, District Judge

No. 74-1417 and 74-1418

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EDWARD CHALE, LEE J. CHRISTAKIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Divsn.
(73 H CR 158)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1205

EDWARD CHALE AND LEE J. CHRISTAKIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court erred (1) in instructing the jury that proof of their actual knowledge that the victim of their assault was an F.B.I. agent was not required to constitute an offense under 18 U.S.C. 111 and (2) in excluding extrinsic evidence offered to impeach the credibility of a government witness.

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioners were convicted of assaulting a federal officer while in the performance of his official duties, in violation of 18 U.S.C. 111. Both petitioners received six-month sentences, thirty days to be served in confinement, with the remainder of the sentence suspended. In addition, they were placed on probation for a period of three years and fined $3,000 (Pet. 4). The court of appeals affirmed in an un-

published order (Pet. App. A), and a petition for rehearing was denied on February 19, 1975 (Pet. App. B). The petition for a writ of certiorari was filed on March 24, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, petitioners' contentions do not merit review.

The evidence at trial, as reviewed by the court below, showed that on August 1, 1973, Rick Seebauer, a deputy sheriff for Porter County, Indiana, entered the Golden Coin night club in Gary, Indiana, where he was accosted by an individual later identified as petitioner Chale's brother, who told him "that he wouldn't live to testify before the grand jury" (Pet. App. A 2).[1] Seebauer left the club and reported the threat to Special Agent Melchiori of the Federal Bureau of Investigation. Agent Melchiori subsequently returned to the club with Seebauer for the purpose of ascertaining the identity of the person who had uttered the threat. Melchiori approached Chale's brother, identified himself, and was attempting to follow him to an adjoining dining room when a group of people, including petitioners, stepped forward and stopped him. The encounter eventually led to an altercation in which Agent Melchiori was struck by petitioners and eventually knocked unconscious by a third individual (Pet. App. A 2).[2]

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[1]Seebauer had previously worked with the F.B.I. in an undercover capacity in investigating gambling activities in Gary, Indiana, and was to be a witness before a federal grand jury investigating gambling violations.

[2]There was conflicting evidence at trial relating to the above-described events. Petitioners contended that they did not strike Agent Melchiori. Petitioner Chale admitted initially "impeding" the agent's progress but testified that he ceased doing so after the agent identified himself (Pet. 6). However, petitioners do not here challenge the court of appeals' determination that there was sufficient evidence to support the jury's finding that they willfully assaulted Melchiori (Pet. App. A 3).

1. Petitioners tendered instructions to the trial court, requesting, in effect, that the jury be instructed that it was incumbent upon the government to prove that petitioners were aware of Agent Melchiori's status as a federal officer at the time they assaulted him (Pet. 8-9). The trial court refused those instructions, and charged the jury:

> In order for the Government to establish the offense charged * * * it is not necessary that the Government prove as a part of its case that the defendant had actual knowledge that the victim was an F.B.I. agent who was engaged in the performance of his official duties. [Court's Instruction No. 18.]

Petitioners' argument (Pet. 8-12) that this instruction was erroneous is without merit in light of this Court's recent decision in *United States* v. *Feola*, No. 73-1123, decided March 19, 1975. That case held that where, as here, the government proves a criminal intent to assault, it is immaterial whether the assailants knew that their victim was a federal officer: "All the statute [18 U.S.C. 111] requires is an intent to assault, not an intent to assault a federal officer" (slip op., p. 13).

In *Feola* the Court recognized that there may be circumstances in which ignorance of the official status of the person assaulted negates the existence of the *mens rea* required under 18 U.S.C. 111, such as where a plain-clothes officer's conduct might reasonably have been perceived by the defendant as the unlawful use of force against him or his property, thereby justifying a reasonable degree of resistance (slip op., p. 14). Petitioners cite cases involving such situations (Pet. 10-11), but such cases are inapposite to the situation here, where the agent was not acting in any manner that petitioners could have interpreted as constituting an unlawful show of force against themselves. Nor do petitioners allege that their actions were predicated upon such a belief.

2. During cross-examination of government witness Seebauer by defense counsel, Seebauer denied using or being addicted to marijuana or narcotic drugs. Petitioners proposed to call three witnesses for the purpose of testifying that Seebauer had smoked and distributed marijuana and had on one occasion smoked opium (Pet. 12-13). Petitioners contend (Pet. 12-16) that the trial court erred in excluding such testimony. The court of appeals properly rejected this claim (Pet. App. A 4-5), since specific acts of misconduct, other than conviction of a crime, offered to attack the credibility of a witness, may not be proven by extrinsic evidence.[3] See Rule 608(b), Federal Rules of Evidence (effective July 1, 1975). As the court of appeals pointed out (Pet. App. A5):

> [D]efendants receive no support from recent federal cases * * * that permit extrinsic evidence as to drug addiction to be introduced, because they did not attempt to show that Seebauer was a drug addict. Marijuana is a non-narcotic drug and a single instance of smoking opium would not prove addiction.

Contrary to petitioners' assertions (Pet. 13-15), the opinion below is not in conflict with decisions of other circuits. In *United States* v. *Fowler*, 465 F.2d 664 (C.A. D.C.), it was held that the trial court had unduly limited *cross-examination* as to a witness's use of narcotics. Petitioners admit that they were permitted unrestricted cross-examination as to Seebauer's alleged use of narcotics (Pet. 15). In *United States* v. *Kinnard*, 465 F.2d 566, 575 (C.A. D.C.) (Pet. 13-14), the same court held that "if

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[3]The same result follows if the proffer was an attempt to prove that Seebauer lied when he denied using, or being addicted to, marijuana or narcotics. "Extraneous misconduct of the witness (for which no conviction has been had) * * * is collateral and if denied on cross-examination cannot be proved to contradict." McCormick, *Evidence* §47, p. 102 (1954).

evidence is presented by the defense that a paid government informer is also an addict and under indictment for narcotics violations, this evidence must be presented to the jury along with the special cautionary instruction * * * " (footnote omitted). As the court below noted (Pet. App. A 5), the petitioners' proferred testimony, even if credited, would not have proved Seebauer to be an addict. Nor was he a paid government informer or under indictment at the time he testified.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.